IN THE
TENTH COURT OF APPEALS

No. 10-17-00365-CR

DAVID GRANTHAM,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 13th District Court
Navarro County, Texas
Trial Court No. C36803-CR

MEMORANDUM OPINION

David Grantham appeals from a conviction for the offense of engaging in organized criminal activity, for which he was sentenced to twenty-seven (27) years in prison after pleading true to two enhancements. TEX. PENAL CODE ANN. §§ 71.02, 12.42(d) (West 2011). Grantham complains that his plea was not voluntary because he was not properly admonished on the appropriate range of punishment. Because we find no reversible error, we affirm the judgment of the trial court.

Grantham pled guilty to the offense in an "open" plea with no agreement as to the sentence to be imposed. He signed a document entitled "Felony Admonitions" prior to his plea, which listed the ranges of punishment for all felony offenses. Check marks were placed next to the boxes for second degree and third degree punishment. The box next to the "habitual offender" definition with the actual range of punishment sought (25-99 years or life) was not checked. During the plea hearing, the trial court orally admonished Grantham that the range of punishment was 2 to 20 years in prison and a $10,000 fine. After Grantham pled guilty, the trial court accepted Grantham's plea and reset the case for the preparation of a PSI (Pre-Sentence Investigation) and sentencing.

At the sentencing hearing, the trial court did not admonish Grantham regarding the range of punishment. Grantham testified at the hearing and asked the trial court to consider probating his sentence and placing him on community supervision. Grantham admitted that the enhancement paragraphs were true. At the end of the hearing, the trial court sentenced Grantham to twenty-seven years in prison. Grantham did not object to the sentence. Shortly thereafter, Grantham filed a motion for new trial alleging that the sentencing should be reconsidered because Grantham was eligible for deferred adjudication community supervision and he contended that the trial court did not properly consider his eligibility for deferred adjudication. The trial court granted Grantham's motion as to punishment only, and conducted a new sentencing hearing.

Again, there was no admonishment to Grantham on the proper range of punishment. The trial court again sentenced Grantham to twenty-seven years in prison.

Grantham complains that the trial court erred by giving him improper admonishments pursuant to article 26.13 of the Code of Criminal Procedure and that the improper admonishments resulted in a due process violation because he did not plead guilty knowingly and voluntarily.

ARTICLE 26.13 VIOLATION

Article 26.13(a) of the Texas Code of Criminal Procedure requires the trial court to admonish a defendant before accepting a guilty plea. TEX. CODE CRIM. PROC. ANN. art. 26.13(a) (West Supp. 2016). One of the required admonitions is the punishment range applicable to the offense to which the defendant is pleading guilty. *Id.* art. 26.13(a)(1). The admonitions are required to ensure that the defendant enters an "adequately informed plea[.]" *Davison v. State*, 405 S.W.3d 682, 687 (Tex. Crim. App. 2013). There is no question that the trial court's admonishments at the initial plea and the signed "Felony Admonitions" document were erroneous.

A trial court's error in failing to give the proper admonitions is subject to a harm analysis. *Id.* at 687-88. Because a claim regarding a violation of article 26.13 is predicated solely upon a statutory violation, the standard for determining harm that pertains to claims of non-constitutional error applies. *See* TEX. R. APP. P. 44.2(b). *Id*. In our assessment of harm, we examine the entire record to determine whether Grantham was

aware of the range of punishment to which he would be subject if the enhancements alleged were proved and about which he should have been admonished prior to entering his guilty plea. *Id*. at 688. To find no harm from a failure to admonish, we must "have a fair assurance that the defendant's decision to plead guilty would not have changed had the court admonished him" regarding the applicable punishment range. *VanNortrick v. State*, 227 S.W.3d 706, 708-09 (Tex. Crim. App. 2007).

The record from the initial guilty plea, the first sentencing hearing, the motion for new trial hearing, and the second sentencing hearing contains nothing to indicate that Grantham was unaware of the range of punishment. At the original sentencing hearing, the State specifically pointed out in its closing argument that Grantham had pled true to two enhancements of a third-degree felony and that the minimum sentence was 25 years. Grantham was asking the trial court to send him to SAFP for drug treatment and to place him on community supervision. The State contended that community supervision was not available as a potential sentence because it was impossible for the trial court to sentence him to less than ten years because of the 25-year minimum. The trial court then sentenced Grantham to 27 years in prison, asked him if there was any reason that the sentence should not be pronounced to which Grantham's counsel said "no," and then pronounced sentence. Grantham did not express anything on the record to demonstrate that he or his counsel were unaware of the potential of the sentence given or surprised by the sentence imposed.

In his motion for new trial, Grantham's trial counsel complained that it was erroneous for the trial court to have not considered deferred adjudication community supervision and that the State's arguments regarding the impropriety of community supervision in a proceeding where the range of punishment was 25 to 99 years or life were erroneous because there is no prohibition against deferred adjudication. During the motion for new trial hearing, trial counsel for Grantham and the State discussed the range of punishment of 25 to 99 or life throughout the hearing. The trial court, after taking the matter under advisement, granted the motion for new trial as to the sentencing hearing only.

In the second sentencing hearing, Grantham testified again about his desire for drug treatment and being placed on community supervision. In closing argument, Grantham's trial counsel argued for deferred adjudication community supervision and stated that Grantham knew that he was going to be in prison for at least 25 years unless the trial court granted his request. Trial counsel argued that Grantham knew that if he violated community supervision that "what is going to be hanging over his head is that 25 years to life. And he knows that. As he sits here today, he understands that." The trial court once again sentenced Grantham to 27 years in prison and neither Grantham nor his trial counsel gave a reason why that sentence should not be pronounced.

This proceeding is somewhat unusual in that Grantham had the opportunity to complain or let the trial court otherwise know of any confusion regarding the potential

range of punishment more than one time, after he was originally sentenced to a longer sentence than that for which he had originally been admonished, at the motion for new trial hearing, and the second sentencing. Our review of the record gives us "a fair assurance that the defendant's decision to plead guilty would not have changed had the court admonished him" regarding the applicable punishment range. *VanNortrick v. State*, 227 S.W.3d 706, 708-09 (Tex. Crim. App. 2007). Therefore, we find that the trial court's error was harmless.

DUE PROCESS VIOLATION

Grantham further complains that the improper admonishments resulted in a due process violation and therefore his plea was involuntary. Federal due process requires that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Davison*, 405 S.W.3d at 686 (*citing Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)); *Mendez v. State*, 138 S.W.3d 334, 344 (Tex. Crim. App. 2004). A criminal defendant who enters a plea of guilty has by definition relinquished his Sixth Amendment rights to a trial by jury and to confront the witnesses against him, as well as his Fifth Amendment privilege against self-incrimination. *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). "For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.'" *Id*. (*quoting Johnson v.*

Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). A criminal defendant who is induced to plead guilty in a state court in total ignorance of the precise nature of the charge and the range of punishment it carries has suffered a violation of procedural due process. *Smith v. O'Grady*, 312 U.S. 329, 61 S. Ct. 572, 85 L. Ed. 859 (1941).

For his guilty plea to be constitutionally valid, then, the defendant must have an actual awareness of the nature and gravity of the charges against him and of the constitutional rights and privileges that he necessarily relinquishes—in short, "a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *Aguirre-Mata v. State*, 125 S.W.3d 473 (Tex. Crim. App. 2003) (hereinafter, "*Aguirre-Mata II*").

In *Davison v. State*, the Court of Criminal Appeals explained *Boykin* and its progeny by stating:

> What the United States Supreme Court's 1969 opinion in *Boykin v. Alabama* contributed to this due process jurisprudence "was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." *Brady*, *supra*, at 747 n.4. Thus, "when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed." *United States v. Benitez*, 542 U.S. 74, 84 n.10, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004). *See also Gardner v. State*, 164 S.W.3d 393, 399 (Tex. Crim. App. 2005) (*citing Benitez* for this proposition). We have noted on more than one occasion, however, "that Boykin did not specifically set out what must be 'spread on the record' to comply with [its] mandate." *Gardner, supra*, at 399 (*quoting Aguirre-Mata II, supra*, at 475). Moreover, "*Boykin* clearly did not hold that due process requires the equivalent of the Article 26.13(a) admonishments or an admonishment on the range of punishment." *Aguirre-Mata II*, *supra*, at 475-76; *see also VanNortrick v. State*, 227 S.W.3d 706, 708 (Tex. Crim. App. 2007)

> ("The Article 26.13 admonishments . . . are not themselves constitutionally required.). So long as the record otherwise affirmatively discloses that the defendant's guilty plea was adequately informed, due process is satisfied. For the appellant to prevail on his constitutional claim, therefore, it is not enough that the record is unrevealing with respect to whether he was admonished by the trial court; the record must also be silent with respect to whether he was otherwise provided, or nevertheless aware of, the requisite information to render his guilty plea voluntary and intelligent.

Davison, 405 S.W.3d at 687.

The facts in *Davison v. State* are strongly similar to the facts before us in this proceeding. In *Davison*, the trial court admonished the defendant to the incorrect range of punishment and Davison's complaints on appeal were the same as Grantham's. In analyzing whether a due process violation had occurred, the Court of Criminal Appeals stated:

> In the "Guilty Plea Memorandum," which the appellant signed, he was admonished with respect to each of the particular constitutional rights mentioned in *Boykin* that a defendant pleading guilty necessarily waives—trial by jury, confrontation, and the privilege against self-incrimination. Thus, the record is not altogether silent with respect to whether the appellant understood the consequences of his plea. In *Aguirre-Mata II*, "[w]e have found no Supreme Court case . . . holding that a trial court's failure to admonish a guilty-pleading defendant on the range of punishment renders the guilty plea invalid." *Aguirre-Mata II*, 125 S.W.3d at 475 n.7. But even assuming that a silent record with respect to the appellant's awareness of the range of punishment is alone sufficient to trigger *Boykin's* appellate presumption, the record in this case is not totally "silent" with respect to appellant's knowledge of the applicable range of punishment when he entered his plea. *Boykin, supra*, 395 U.S. at 243.
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> At the plea proceeding in *Boykin*, "[s]o far as the record show[ed], the judge asked no questions of [Boykin] concerning his plea, and [Boykin] did not address the court." *Id.* at 239. Moreover, "the record [was] wholly silent [and threw] no light on" whether some trial strategy may have played a role

> in Boykin's decision to plead guilty. *Id*. at 240. Here, by contrast (and as the court of appeals identified as part of its Rule 44.2(b) harm analysis), from the record as a whole it may be inferred that, although the appellant's guilty plea was open, not negotiated, he did not plead in ignorance of the applicable range of punishment. Thus, the record in this case fails to engage *Boykin's* appellate presumption that due process was violated because the appellant entered an unintelligent guilty plea. Nor does the record affirmatively refute the inference, deriving from the appellant's failure to protest when the greater punishment range that was mentioned during the punishment proceedings was actually imposed upon him at sentencing, that he must have been aware of his susceptibility to that greater range—even as of the time he entered his guilty plea—despite the trial court's inaccurate admonishment.
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> In short, … we now conclude that the appellant has failed to establish the merits of his due process claim.

Davison, 405 S.W.3d at 692. Similarly, in this proceeding, as expressed in our harm analysis above, the record supports the inference that Grantham was not ignorant of the full range of punishment available to the trial court. We do not find that Grantham has established that the trial court's error constituted a due process violation. We overrule Grantham's sole issue.[1]

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[1] In its brief, the State claims that Grantham's trial counsel was ineffective for failing to ensure that Grantham was aware of the full range of punishment and seeks an abatement for the trial court to conduct a hearing for Grantham's trial counsel to testify regarding Grantham's knowledge of the range of punishment. We decline to follow the State's request to impose an issue upon Grantham which he did not raise in this appeal. As the Court of Criminal Appeals stated in *Davison*,

> Our holding today would not foreclose the appellant from obtaining relief in a post-conviction habeas corpus proceeding in the event that he may be able to allege and prove facts beyond what is revealed in the appellate record that are sufficient to establish to our satisfaction that he was in fact unaware of the accurate range of punishment at the time he entered his guilty plea in this cause. We merely hold today that the appellate record does not trigger the *Boykin* presumption or otherwise demonstrate a violation of due process.

CONCLUSION

Having found no reversible error, we affirm the judgment of the trial court.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed May 9, 2018
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Davison, 405 S.W.3d at 692 n.60. Additionally, to the degree that the State requested that we consider the rejected plea bargain offer form and affidavit of the District Attorney which were filed with this Court in a supplemental Clerk's record, we decline to do so because the form does not appear to have been filed with the trial court and the affidavit was not executed until a few days prior to the filing of the State's brief to this Court and are therefore, not properly part of the record for us to consider.